STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ALBERT ALLEN POWELL,

Defendant-Appellant.

UNPUBLISHED
September 5, 2000

No. 213637
Iosco Circuit Court
LC No. 98-003673-FC

Before: Wilder, P.J., and McDonald and Doctoroff, JJ.

PER CURIAM.

Defendant appeals as of right his conviction following a jury trial of six counts of first-degree criminal sexual conduct, MCL 750.520b; MSA 28.788(2). The trial court sentenced defendant as a second habitual offender, MCL 769.10; MSA 28.1082, to thirty to sixty years in prison. We affirm.

I

Defendant first argues that there was insufficient evidence to convict him of first-degree criminal sexual conduct beyond a reasonable doubt. We disagree. In evaluating whether the evidence introduced against defendant supports his conviction, this Court views the evidence in the light most favorable to the prosecutor and determines whether a rational trier of fact could find that the elements of the crime charged were proven beyond a reasonable doubt. *People v Carines*, 460 Mich 750, 757; 597 NW2d 130 (1999).

The elements of first-degree criminal sexual conduct are: (1) the defendant engaged in sexual penetration with the complainant, (2) the complainant is between the ages of thirteen and sixteen years old, and (3) the defendant is related to the complainant by blood or affinity to the fourth degree. MCL 750.520b(1)(b)(ii); MSA 28.788(2)(1)(b)(ii). The testimony of a victim need not be corroborated in prosecutions for first-degree criminal sexual conduct. MCL 750.520h; MSA 28.788(8). It is well established that issues of witness credibility are left to the trier of fact to decide and a defendant can be convicted of criminal sexual conduct based on the uncorroborated testimony of the victim. See *People v Lemmon*, 456 Mich 625, 642-643 n 22; 576 NW2d 129 (1998); *People v Smith*, 149 Mich App 189, 195; 385 NW2d 654 (1986).

The issue here is whether there was sufficient evidence to convict defendant of six counts of first-degree criminal sexual conduct when the complainant was the only person to testify regarding the acts of penetration and several witnesses testified on behalf of defendant that the complainant was not present at the alleged scene of the incidents during the months that complainant alleges the incidents occurred. The complainant testified that at the time of the incidents she was fifteen years old and that defendant is her uncle. The complainant further testified that during two separate incidents defendant engaged in three types of sexual penetration with her, including intercourse, cunnilingus, and fellatio. The complainant's testimony was sufficient evidence on which to convict defendant of six counts of first-degree criminal sexual conduct. Although there was evidence that conflicted with the complainant's testimony, this Court must not interfere with the jury's role of determining the credibility of witnesses and the weight of the evidence. *People v Wolfe*, 440 Mich 508, 514-515; 489 NW2d 478, amended 441 Mich 1201 (1992), quoting *People v Palmer*, 392 Mich 370, 375-376; 220 NW2d 393 (1974); *People v Terry* 224 Mich App 447, 452; 569 NW2d 641 (1997). Therefore, defendant's conviction is supported by sufficient evidence and reversal is not required.

II

Defendant next argues that he was denied the effective assistance of counsel as a result of his attorney's failure to move for severance of the counts against him arising out of two separate incidents. We disagree.

Because defendant did not raise the issue of ineffective assistance of counsel in the trial court this Court's review is limited to mistakes that are apparent on the record. *People v Nantelle*, 215 Mich App 77, 87; 544 NW2d 667 (1996). To establish ineffective assistance of counsel, a defendant must show that: (1) the attorney's performance was unreasonable based on an objective standard, and (2) but for the attorney's unreasonable performance, a different outcome would have occurred and, therefore, the defendant was denied a fair trial. *People v Pickens*, 446 Mich 298, 303; 521 NW2d 797 (1994).

Defendant bears the heavy burden of overcoming the presumption that he received the effective assistance of counsel by showing that his counsel's performance was objectively unreasonable and that he was prejudiced as a result. *People v Rockey*, 237 Mich App 74, 76; 601 NW2d 887 (1999). Furthermore, this Court must not substitute its own judgment for that of defense counsel in matters of trial strategy and it must not assess counsel's competence with the benefit of hindsight. *Id.* at 76-77. Counsel is not required to make a frivolous or meritless motion. *People v Darden*, 230 Mich App 597, 605; 585 NW2d 27 (1998). This Court has held there was no reversible error based on ineffective assistance of counsel where it was unlikely the defendant would have obtained a severance even if counsel had moved for severance. *People v Burnett*, 166 Mich App 741, 752-753; 421 NW2d 278 (1988). Therefore, the issue is whether it is likely defendant would have obtained severance of the counts against him.

MCR 6.120 provides in part:

(B) Right of Severance. Unrelated Offenses. *On the defendant's motion, the court must sever unrelated offenses for separate trials*. For purposes of this rule, two offenses are related if they are based on

(1) the same conduct, or

(2) a series of connected acts or acts constituting part of a single scheme or plan.

(C) Other Joinder or Severance. On the motion of either party, except as to offenses severed under subrule (B), the court *may* join or sever offenses on the ground that joinder or severance is appropriate to promote fairness to the parties and a fair determination of the defendant's guilt or innocence of each offense. Relevant factors include the timeliness of the motion, the drain on the parties' resources, the potential for confusion or prejudice stemming from either the number of charges or the complexity or nature of the evidence, the potential for harassment, the convenience of witnesses, and the parties' readiness for trial. Subject to an objection by either party, the court may sever offenses on its own initiative. [MCR 6.120 (emphasis added).]

This Court has held MCR 6.120 is a codification of the Supreme Court's decision in *People v Tobey*, 401 Mich 141; 257 NW2d 537 (1977); see *People v Daughenbaugh*, 193 Mich App 506, 509-510; 484 NW2d 690, modified 441 Mich 867 (1992). This case is similar to *People v Miller*, 165 Mich App 32, 43-44; 418 NW2d 668 (1987), remanded on other grounds 434 Mich 915 (1990), in which the defendant was charged with two counts of criminal sexual conduct and he claimed the trial court should have granted his motion to sever the two counts because there was no evidence that the sexual acts occurred as part of the same transaction. Relying on *Tobey*, this Court held that even though the charges against the defendant were not based on the same conduct because there was no evidence to indicate a single transaction, the separate counts did constitute a series of acts constituting a single scheme or plan: "Here, the victim's testimony revealed that these incidents occurred during warm weather and at the learning center in locations of seclusion. These facts indicate a single plan or scheme on the part of defendant to sexually molest the victim when the opportunity presented itself." *Id.* at 45.

In this case, the complainant testified that defendant sexually assaulted her on two separate occasions. Both of the incidents occurred while the complainant was visiting at her grandmother's house and while her grandmother was not home at the time. Both incidents involved the same types of penetration: intercourse, fellatio, and cunnilingus. As in *Miller*, the separate incidents of criminal sexual conduct in this case evidence acts constituting a common scheme or plan to take sexual advantage of the complainant whenever the opportunity arose. Therefore, the incidents were related and defendant was not entitled to severance of the separate counts against him. MCR 6.120(B). Furthermore, this Court has held that under MCR 6.120(C) a trial court is not required to sever related offenses. *People v Duranseau*, 221 Mich App 204, 208; 561 NW2d 111 (1997). Thus, it is not likely that defendant would have obtained severance of the separate counts of criminal sexual conduct against him even if his

counsel had moved for severance and defendant was not denied the effective assistance of counsel. *Burnett*, *supra* at 752-753.

III

Defendant next argues that he was denied a fair trial as the result of a witness' nonresponsive testimony regarding other sexual assaults by defendant during cross-examination. Again, we disagree.

Whether a defendant was afforded due process is a question of law to be reviewed de novo by this Court. *People v Walker*, 234 Mich App 299, 302; 593 NW2d 673 (1999). Defendant was not denied a fair trial as a result of the witness' nonresponsive testimony. First, defendant failed to request a curative instruction after the court sustained his objection to the testimony as nonresponsive. Any prejudice to defendant caused by the witness' nonresponsive testimony could have been cured by an instruction to the jury to disregard the witness' statement that there were many sexual assaults. Second, defendant failed to move for a mistrial and even if he had so moved the trial court could have denied the motion without abusing its discretion. A mistrial should only be granted where the incident is so egregious that the prejudicial effect can be removed in no other way. *People v Coles*, 417 Mich 523, 554-555; 339 NW2d 440 (1983), overruled on other grounds *People v Milbourn*, 435 Mich 630, 642-650; 461 NW2d 1 (1990). Although the witness' testimony was nonresponsive and arguably prejudicial to defendant because it placed evidence of other sexual assaults in front of the jury, any such prejudice could have been cured by a curative instruction. Furthermore, the complainant had already testified that there were several incidents of sexual assault by defendant. Therefore, defendant was not denied a fair trial as a result of the witness' nonresponsive testimony regarding sexual assaults for which defendant was not charged.

IV

Defendant next argues that he was denied his due process rights as the result of the trial court's ruling that, if defendant called his son to testify, the prosecution could impeach the witness by showing bias through the introduction of the witness' prior criminal sexual conduct conviction. Although we find the trial court's ruling was error, it was harmless error not requiring reversal.

The decision whether to admit evidence is within the trial court's discretion and must not be disturbed by this Court absent a clear abuse of discretion. *People v Starr*, 457 Mich 490, 494; 577 NW2d 673 (1998). An abuse of discretion occurs when an unprejudiced person, considering the facts on which the trial court acted, would say there was no justification or excuse for the ruling. *People v Ullah*, 216 Mich App 669, 673; 550 NW2d 568 (1996). Described another way, an abuse of discretion exists when the court's decision is so grossly violative of fact and logic that it evidences perversity of will, defiance of judgment, and the exercise of passion or bias. *Id.*

Generally, all relevant evidence is admissible. MRE 402; *Starr*, *supra* at 497. Evidence is relevant if it is both material and probative. MRE 401; *People v Crawford*, 458 Mich 376, 388-389; 582 NW2d 785 (1998). Evidence is material if it tends to make any fact of consequence to the claim more or less probable. *Id.* The credibility of a witness is a material issue. *People v Mills*, 450 Mich

61, 72; 537 NW2d 909, modified and remanded 450 Mich 1212 (1995). Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence. MRE 403; *Id.* at 74-75. Unfair prejudice exists when there is a tendency for the jury to give undue or preemptive weight to it or when it would be inequitable to allow admission of the evidence. *Id.* at 75-76. Finally, evidence that is admissible for one purpose is not made inadmissible solely because it is inadmissible for another purpose. *People v VanderVliet*, 444 Mich 52, 73; 508 NW2d 114 (1993), amended 445 Mich 1205 (1994).

The trial court in this case acknowledged that defendant's son's conviction of criminal sexual conduct was inadmissible under MRE 609 because it did not involve dishonesty or theft. However, the court ruled the evidence admissible under MRE 607 to show bias. This ruling was error; although the credibility of a witness is a material issue, the fact that the witness was convicted of criminal sexual conduct and is testifying on behalf of his father in a criminal sexual conduct case is minimally probative of the witness' credibility and the evidence is highly prejudicial. MRE 403. Furthermore, this Court has previously held that a "witness' credibility may be impeached with evidence of prior convictions, MCL 600.2159; MSA 27A.2159, but only if the criteria set forth in MRE 609 are satisfied." *People v Nelson*, 234 Mich App 454, 460; 594 NW2d 114 (1999).

In *People v Storch*, 176 Mich App 414; 440 NW2d 14 (1989), the defendant was convicted of first-degree criminal sexual conduct. The defendant's sister and her boyfriend testified on his behalf. *Id.* at 420. The prosecution was allowed to introduce evidence of the boyfriend's prior criminal sexual conduct conviction and the defendant appealed. *Id.* at 421. This Court analyzed the issue under a prior version of MRE 609, which required the probative value of the evidence on the issue of credibility to outweigh its prejudicial effect. *Id.* This Court held the evidence was improperly admitted because it was potentially unfairly prejudicial and only minimally, if at all, probative on the issue of credibility because the crime of criminal sexual conduct does not involve elements of theft, dishonesty, or false statement. *Id.* at 421-422.

Although the trial court did not admit the evidence of defendant's son's criminal sexual conduct conviction pursuant to MRE 609, evidence cannot be admitted if its probative value is outweighed by its potential prejudicial effect and therefore this Court's decision in *Storch* is applicable by analogy. MRE 403; *Mills*, *supra* at 75-76. The fact that the proposed witness is defendant's son may be probative of bias because a son will likely be more inclined to lie to protect his father than for someone else. However, the fact that the witness was convicted of the same crime as the defendant is charged with is minimally, if at all, probative of the witness' credibility. The fact that one is convicted of a crime does not in itself show that he will lie to prevent another from being convicted of the same crime. Furthermore, this evidence was potentially very highly prejudicial. The jury had already learned that defendant's brother was accused of criminal sexual conduct and that defendant was charged with criminal sexual conduct. The fact that defendant's son was convicted of criminal sexual conduct could lead the jury to believe that defendant was also guilty. Therefore, the evidence of the witness' prior criminal sexual conduct conviction should not have survived MRE 403 analysis and the trial court's ruling that it would allow admission of the evidence if he testified was an abuse of discretion.

However, the trial court's error was harmless and does not require reversal. A preserved, nonconstitutional error is not a ground for reversal unless after an examination of the entire cause, it shall affirmatively appear that it is more probable than not that the error was outcome determinative. *People v Lukity*, 460 Mich 484, 496; 596 NW2d 607 (1999). Defendant did not state on the record below what defendant's son would have testified to if the court had not ruled he could be impeached by his prior criminal sexual conduct conviction. On appeal, defendant argues that he would have testified that (1) he lived at his grandmother's home during the time of the alleged incidents, (2) he shared a bedroom with Todd Childs, (3) the alleged events could not have occurred at the time and place alleged by the complainant, (4) the complainant is untruthful, and (5) he could have "bolstered and filled in the gaps in Todd Childs' testimony supporting the defense theory."

We conclude that it is not more probable than not that, but for the trial court's error, the outcome of this case would be different. Defendant's son's proposed testimony is merely cumulative of the testimony of defendant's other witnesses. Several defense witnesses had already testified that the complainant was untruthful, that the incidents could not have occurred during the time alleged by the complainant, and that defendant's son lived with his grandmother. Furthermore, defendant's allegation that defendant's son would bolster and fill in the gaps in Todd Childs' testimony is too vague to overcome the presumption that the trial court's error was not outcome determinative. Because defendant has failed to show that his son's testimony was essential to defendant and that it would have changed the verdict in this case, the trial court's error was harmless and does not require reversal by this Court.

V

Defendant next argues that he was denied a fair trial as a result of a statement by the prosecutor during his closing argument rebuttal that appealed to the jury's sympathy for the complainant. Defendant is essentially arguing that the trial court's curative instruction was insufficient to cure the prejudice caused by the prosecutor's statement. Because defendant failed to object to the court's curative instruction or request that it be supplemented this issue is not preserved for review by this Court. *People v Tunstull*, 54 Mich App 254, 257; 220 NW2d 703 (1974). Furthermore, although the prosecutor's statement improperly appealed to the jury's sympathy for the complainant, the court's instruction was sufficient to cure any error caused by the prosecutor's statement because it reminded the jurors that their task was to decide the case based on the facts and not to sympathize with the complainant. See *People v Swartz*, 171 Mich App 364, 372-373; 429 NW2d 905 (1988).

VI

Finally, we briefly address the issues defendant raises in his pro se brief. First, defendant claims the prosecutor vindictively added three counts of first-degree criminal sexual conduct because his attorney vigorously cross-examined the complainant. Defendant's argument is without merit. At the conclusion of the preliminary examination, the prosecutor asked the district court to bind defendant over on three additional counts not included in the original felony complaint in order to conform to the evidence at the preliminary examination. There was no abuse of discretion in adding these counts. *People v Gonazalez*, 214 Mich App 513, 515; 543 NW2d 354 (1995); *People v Joseph*, 114 Mich

App 70, 77-78; 318 NW2d 609 (1982). In addition, defendant's claim that he was not arraigned on these charges is without merit. The lower court record reveals that he was arraigned and pleaded not guilty on March 23, 1998.

Next, defendant claims he was denied a fair trial because the trial court admitted edited recordings of telephone conversations that he had with the complainant. Defendant argues his convictions should be reversed because the original tapes were never provided to him or to the trial court. Defendant's claim is not preserved and is without factual support. Although the issue of the admissibility of the tapes was the subject of pretrial hearings, defendant never raised this issue below. Moreover, our review of the lower court record indicates that defendant and his counsel did listen to the original tapes.

Finally, defendant claims that he received ineffective assistance of counsel. We disagree. Defendant improperly attempts to expand the lower court record with an affidavit in which he alleges counsel had a conflict with the trial court. MCR 7.210. We have not considered this affidavit; therefore, there is no support in the record for defendant's claim. *People v Mitchell*, 454 Mich 145, 162-163; 560 NW2d 600 (1997). Defendant also claims counsel was ineffective for failing to object to the three additional charges of criminal sexual conduct that were added following the preliminary examination and for failing to object to the admission of the tape recorded conversations. Counsel was not required to advocate these meritless positions. *People v Rodriguez*, 212 Mich App 351, 356; 538 NW2d 42 (1995).

Affirmed.

/s/ Kurtis T. Wilder
/s/ Gary R. McDonald
/s/ Martin M. Doctoroff